

## 48A C.J.S. Judges § 235

Corpus Juris Secundum | August 2023 Update

### Judges

Joseph Bassano, J.D.; Khara Singer-Mack, J.D.; Thomas Muskus, J.D.; Karl Oakes, J.D. and Jeffrey J. Shampo, J.D.

### IX. Disqualification to Act

#### A. In General

### § 235. Necessity as precluding disqualification

[Topic Summary](#) | [References](#) | [Correlation Table](#)

#### West's Key Number Digest

West's Key Number Digest, [Judges](#)  39

**The rule of necessity allows an otherwise disqualified judge to participate if the case cannot be heard otherwise.**

The rule of necessity, which is an exception to the disqualification of a judge,<sup>1</sup> allows an otherwise disqualified judge to participate if the case cannot be heard otherwise.<sup>2</sup> Thus, the rule of necessity imposes a duty on a judge to act in a proceeding wherein the judge is otherwise disqualified if the judge's jurisdiction is exclusive<sup>3</sup> and if there is no provision for substitution.<sup>4</sup> The rule of necessity is part of the common law of judicial procedure, available to judges when reasons behind it are present.<sup>5</sup> In such cases, the court must act no matter how disagreeable its task may be.<sup>6</sup>

A disqualified judge may not act, however, if the law provides for substitution of personnel on the court or if another tribunal exists to which resort may be had.<sup>7</sup> Thus, the rule of necessity does

not apply where the judge in question is not in a better position to decide the issues presented and where the trial judge that began the hearing is able to hear the case and decide the issues.<sup>8</sup>

The rule of necessity applies with particular force where all judges are arguably disqualified.<sup>9</sup> In short, where all are disqualified, none are disqualified.<sup>10</sup> Therefore, where a particular conflict of interest in a case applies equally to all state court judges, the justices are not disqualified for such conflict under the rule of necessity.<sup>11</sup> Similarly, the necessity principle is applied where all members of a court are challenged by the same motion in order to avoid the disqualification of an entire court.<sup>12</sup>

### ***Personal interest.***

A judge is not disqualified, under the rule of necessity, from adjudicating a cause because of personal financial interest if there is no other judge or court available to hear and resolve the cause.<sup>13</sup> For instance, where all of the members of the court have health care insurance provided by a party, it is impracticable for any member of the court to enter a recusal, and, therefore, the court will invoke the rule of necessity to enable the members of the court to hear the case without regard to any disqualifications that may exist.<sup>14</sup> Likewise, the rule of necessity requires that justices refuse to recuse themselves from hearing a citizen's petition for review of a declaration by the secretary of state where the petition contains a proposed amendment to cap salaries and regulate the benefits of all state officers and employees, including supreme court justices.<sup>15</sup> Also, the rule of necessity requires justices to consider a proceeding which involves amending the state constitution with respect to the qualifications of judicial officers even though the nature of the changes sought can have an effect on some members of the court.<sup>16</sup>

### ***Judge as party.***

The rule of necessity may apply where judges would ordinarily be disqualified by the rule that a judge may not participate in any matter in which the judge is a party.<sup>17</sup>

## **CUMULATIVE SUPPLEMENT**

### **Cases:**

State legislature's investigation into alleged misconduct of Judicial Branch and Montana Judges Association's (MJA) polling practices was investigation of every judge of state, and thus Rule of

Necessity applied to preclude Supreme Court justices' disqualification in original action brought by Judicial Branch's court administrator to quash/enjoin enforcement of subpoena issued by legislature demanding production of all e-mails and documents sent and received by her over three-month period; disqualification of every justice would compromise Court's ability to fulfill its constitutional duties. [McLaughlin v. Montana State Legislature](#), 2021 MT 120, 489 P.3d 482 (Mont. 2021), subsequent determination, 2021 MT 178, 2021 WL 2945034 (Mont. 2021).

## [END OF SUPPLEMENT]

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### Footnotes

- 1 W. Va.—[State ex rel. Brown v. Dietrick](#), 191 W. Va. 169, 444 S.E.2d 47 (1994).
- 2 U.S.—[Beer v. U.S.](#), 696 F.3d 1174 (Fed. Cir. 2012), cert. denied, 133 S. Ct. 1997, 185 L. Ed. 2d 866 (2013).  
Tenn.—[Hooker v. Haslam](#), 393 S.W.3d 156 (Tenn. 2012).
- 3 Colo.—[Office of State Court Adm'r v. Background Information Services, Inc.](#), 994 P.2d 420 (Colo. 1999).  
Okla.—[Southwestern Bell Telephone Co. v. Oklahoma Corp. Com'n](#), 1994 OK 38, 873 P.2d 1001 (Okla. 1994).
- 4 Mo.—[Jennings v. Station Casino St. Charles](#), 196 S.W.3d 552 (Mo. Ct. App. E.D. 2006).  
Mont.—[Reichert v. State ex rel. McCulloch](#), 2012 MT 111, 365 Mont. 92, 278 P.3d 455 (2012).  
**Rule of necessity applied to issue of whether judge must retire at age 70**  
N.H.—[Grinnell v. State](#), 121 N.H. 823, 435 A.2d 523 (1981).
- 5 U.S.—[Complaint of Doe](#), 2 F.3d 308 (8th Cir. Jud. Council 1993).
- 6 Mont.—[Reichert v. State ex rel. McCulloch](#), 2012 MT 111, 365 Mont. 92, 278 P.3d 455 (2012).
- 7 Ill.—[Smith v. Department of Registration & Ed.](#), 412 Ill. 332, 106 N.E.2d 722 (1952).
- 8 Tenn.—[Ahern v. Ahern](#), 15 S.W.3d 73 (Tenn. 2000).
- 9 N.J.—[In re P.L. 2001, Chapter 362](#), 186 N.J. 368, 895 A.2d 1128 (2006) (the rule forbids the disqualification of the entire judiciary from hearing a case even if there is some perception that the result may be tinged by self-interest).  
Wis.—[Wisconsin Judicial Com'n v. Prosser](#), 2012 WI 69, 341 Wis. 2d 656, 817 N.W.2d 830 (2012).
- 10 Wis.—[In re Judicial Disciplinary Proceedings Against Prosser](#), 2012 WI 103, 343 Wis. 2d 548, 817 N.W.2d 875 (2012).
- 11 Cal.—[People v. Kipp](#), 26 Cal. 4th 1100, 113 Cal. Rptr. 2d 27, 33 P.3d 450 (2001).

- 12 Vt.—Vermont Supreme Court Administrative Directive No. 17 v. Vermont Supreme Court, 154 Vt. 217, 576 A.2d 127 (1990).
- 13 Cal.—Olson v. Cory, 27 Cal. 3d 532, 178 Cal. Rptr. 568, 636 P.2d 532 (1980).
- As to interest and relationship as ground for disqualification, see §§ 275 to 297.
- Alleging unconstitutional deprivation of judicial compensation**  
Under the rule of necessity, the court of appeals would rule on federal judges' appeal from a dismissal of their suit against the United States, seeking backpay and declaratory relief from legislation that blocked five years of cost-of-living adjustments, established by the Ethics Reform Act, as an allegedly unconstitutional deprivation of judicial compensation in violation of the Compensation Clause.
- U.S.—Beer v. U.S., 696 F.3d 1174 (Fed. Cir. 2012), cert. denied, 133 S. Ct. 1997, 185 L. Ed. 2d 866 (2013).
- 14 Del.—Crosse v. BCBSD, Inc., 836 A.2d 492 (Del. 2003).
- 15 Ark.—White v. Priest, 348 Ark. 135, 348 Ark. 783, 73 S.W.3d 572 (2002).
- 16 Colo.—Matter of Title, Ballot Title and Submission Clause, and Summary for 1997-1998 No. 95, 960 P.2d 1204 (Colo. 1998).
- 17 N.Y.—New York State Ass'n of Criminal Defense Lawyers v. Kaye, 95 N.Y.2d 556, 721 N.Y.S.2d 588, 744 N.E.2d 123 (2000).
- As to participation in same cause as ground for disqualification, see §§ 260 to 271.